

- A **MURUGAYAH R NARAYANASAMY**
- v.
- B **DATO' TAN TING WONG & ANOR**
- B HIGH COURT MALAYA, KUALA LUMPUR
NIK HASMAT MOHAMAD JC
[SUIT NO: S-22-927-2009]
9 NOVEMBER 2012
- C **LEGAL PROFESSION:** *Complaint against advocate and solicitor - Client and solicitor - Whether motivated by malicious intent - Whether frivolous and unreasonable - Whether to pressure advocate and solicitor to withdraw suit against client - Whether advocate and solicitor's reputation and integrity tarnished - Legal Profession Act 1976, ss. 94(3)(m), 99(1), 103D*
- D **TORT:** *Malicious prosecution - Want of reasonable and probable cause - Lodgment of complaint against advocate and solicitor with Disciplinary Board - Whether complaint motivated by malicious intent - Whether complaint frivolous and unreasonable - Whether advocate and solicitor suffered damage to professional career and reputation*
- E
- F The plaintiff, an advocate and solicitor, at the request of the first defendant, acted on behalf of the second defendant in a suit. Following a consent judgment which was entered in respect of the suit, the plaintiff sent a professional bill in respect of the legal services rendered to the second defendant. However, the defendants had failed and neglected to pay the plaintiff's fees, causing the plaintiff to file a civil action for the recovery of the same ('Shah Alam suit'). Three years after the date of the plaintiff's demand for payment of the said fees, the first defendant lodged a complaint against the plaintiff with the Bar Council's Disciplinary Committee ('DC') of the Disciplinary Board. On a day before the hearing of the complaint by the Disciplinary Board, the defendants proposed to withdraw the defendants' complaint to the Disciplinary Board on the conditions that the plaintiff's firm pay to the defendants a sum of RM25,000, withdraw the Shah Alam suit and execute of a letter of release confirming that the plaintiff's firm had ceased from acting for the defendants. Subsequently the DC conducted investigation and upon its recommendation to the
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Disciplinary Board, the complaint against the plaintiff was dismissed. Hence, this action by the plaintiff where the plaintiff claimed that the defendants' complaint to the Disciplinary Board against the plaintiff was malicious and was premised on the defendants' ulterior motive to pressure and induce the plaintiff into withdrawing the Shah Alam suit.

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Held (allowing plaintiff's claim with costs):

(1) The first defendant's lodgment of complaint against the plaintiff was clearly motivated by malicious intent, namely to avoid payment of the plaintiff's professional legal fees and to impose undue pressure on the plaintiff to withdraw the plaintiff's claim in the Shah Alam suit. At the time of the complaint, the plaintiff's claim for the fees remained due and outstanding despite the consent judgment in respect of the dispute had already been entered three years before the complaint to the Disciplinary Board. (paras 8 & 10)

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(2) The defendants' letter of proposal for settlement, made a day before the scheduled hearing of the complaint, was a feeble and frivolous conciliatory attempt. Further, the first defendant's lodgement of complaint was clearly made in absence of any reasonable and probable cause. (paras 11 & 12)

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(3) The plaintiff had successfully proven all the ingredients required to be proven in an action for malicious prosecution against the defendant as enunciated in the case of *Lim Chee Kuo v. The Pacific Bank Bhd*. It was clear that as a result of the first defendant's frivolous and unreasonable complaint, the plaintiff had suffered consequent damage to his professional career and reputation which had been placed in jeopardy pending decision of the Disciplinary Board and, have adversely affected the plaintiff's reputation and integrity as a reputable practicing member of the Bar and a senior partner of a relatively large law firm. (paras 13 & 14)

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Case(s) referred to:

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Lim Chee Kuo v. The Pacific Bank Bhd [1999] 1 CLJ 270 HC (foll)

Legislation referred to:

Legal Profession Act 1976, ss. 94(3)(m), 99(1), 103D

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- A *For the plaintiff - James Culaz; M/s Culaz & Assocs*
For the 1st & 2nd defendants - Kevin Sathiaselvan (Leng Wee Mun with him); M/s Kevin & Co

Reported by S Barathi

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JUDGMENT

Nik Hasmat Mohamad JC:

C **Factual Background**

- D [1] The plaintiff's claim is premised on the defendants' malicious prosecution of the plaintiff where the 1st defendant had lodged a complaint against the plaintiff before the Bar Council's Advisory and Solicitor Disciplinary Board. The plaintiff is an advocate and solicitor practicing in a legal firm, Messrs Kamarudin & Partners who at the request of the 1st defendant had acted on behalf of the 2nd defendant against Syabas Pemaju Sdn Bhd in a suit involving the encroachment of the 2nd defendant's land in the Shah Alam High Court Suit No MT4-22-299-2004.

- E [2] The 2nd defendant had passed a Shareholder and Directors' Circular Resolution on 5 October 2004 and, a consent judgment was consequently entered in respect of the court action dated 11 October 2004. The plaintiff's firm sent the 2nd defendant a professional bill in respect of the legal services rendered amounting to RM592,200 dated 28 October 2004.

- F [3] Upon the plaintiff's service of the said fees on the defendants, the defendants had failed and neglected to pay the plaintiff's fees. Upon the defendants' failure to pay the stated sum, the plaintiff filed a civil action for the recovery of the same *vide* Shah Alam High Court Suit No: MT2-22-1285-2005. The 1st defendant only filed a complaint against the plaintiff on 4 July 2007, three (3) years after defendants' failure to settle plaintiff's legal fees pursuant to the plaintiff's letter of demand dated 28 October 2004 which demanded the defendants to settle the said fees.

- G [4] On 4 July 2007, the 1st defendant lodged a complaint against the plaintiff with the Bar Council's Disciplinary Committee of the Disciplinary Board. The Disciplinary Committee conducted
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investigation and commenced hearing into the 1st defendant's complaint against the plaintiff and pursuant to s. 103D of the Legal Profession Act 1976, made recommendation to the Disciplinary Board. The complaint against the plaintiff was dismissed on 14 August 2009 by the Disciplinary Board, upon recommendation of the Disciplinary Committee.

[5] The plaintiff claimed that the defendants' complaint against the plaintiff was malicious and was premised on the defendants' ulterior motive to pressure and induce the plaintiff into withdrawing the plaintiff's suit against the defendants in the Shah Alam High Court *vide* Suit No: MT2-22-1285-2005 for the recovery of the plaintiff's professional fees due and owing by the 2nd defendant to the plaintiff.

The Plaintiff's Claim

[6] Pursuant to para. 16 of the plaintiff's statement of claim, the plaintiff sought the following reliefs against the defendants:

- (a) general damages for loss of reputation, mental anguish and pain in the sum of RM2,000,000;
- (b) punitive and exemplary damages for malicious prosecution and abuse of process in the sum of RM500,000;
- (c) costs;
- (d) interest; and
- (e) such other relief that this Honourable Court deems fit.

The Court's Judgment

[7] On a balance of probabilities the court finds that the plaintiff had succeeded to prove the plaintiff's case against the 1st defendant and 2nd defendant. Accordingly the plaintiff's claim is allowed for general damages in the amount of RM100,000 and exemplary damages also in the amount of RM100,000 as in para. 16(a) and (b). Costs of RM20,000 is allowed with interest at the rate of 4%.

A Grounds Of Judgment

B [8] The 1st defendant's lodgment of complaint against the plaintiff with the Advocate and Solicitor Disciplinary Committee of the Disciplinary Board of the Bar Council was clearly motivated with malicious intent, namely to avoid payment of the plaintiff's professional legal fees and, to impose undue pressure on the plaintiff to withdraw the plaintiff's claim for professional fees against the 2nd defendant for the payment of professional legal fees in suit No. MTS-22-1285-2005.

C [9] The 1st defendant's complaint against the plaintiff was made to the Advocate and Solicitor's Disciplinary Board *vide* letter dated 4 July 2007 by way of a statutory declaration which was affirmed on 4 July 2007 pursuant to the Statutory Declaration Act 1960. The 1st defendant's complaint against the plaintiff stated as follows:

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- (i) The sum of RM592,000 being Professional Fees as grossly excessive as the matter was settled before proceeding to any Hearing being conducted;
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- (ii) *Albeit* at all times being instructed by us that the Agreement is a result of a commercial discussion between the Defendant and not a settlement to the said Suit, Messrs Kamarudin & Partners had obviously misadvised us to record the terms of the Agreement in the Consent Judgment, which subsequently as indicated in the Bill and the said Letter, resulted in the arbitrary computation of their Professional Fees is based on the value of RM2,820,000 as compensatory damages received by us from the Suit. The computation is clearly incorrect and without any basis what so ever as the respondent has computed it based on what it would amount to in the event the shop houses are completed and sold.
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- (iii) We deeply regret the conduct of Messrs. Kamarudin & Partners and view it to be highly unethical and not becoming of an advocate and solicitor. We sincerely hope and we trust the Malaysian Bar Council will consider the complaint laid before the Council herein and will take the necessary actions. We view this conduct of Messrs Kamarudin & Partners to be hugely unethical as we have been misled to record the term of a commercial transaction into the Consent Judgment of the suit.
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[10] It was clear from the circumstances alluding and surrounding the 1st defendant's lodgment of complaint against the plaintiff that the 1st defendant's complaint was actuated by personal and ulterior motive, namely to induce the plaintiff into withdrawing the plaintiff's claim against the 2nd defendant for the recovery of the plaintiff's professional legal fees in the Shah Alam Suit No. MT2-22-1285-2005. At the time of the 1st defendant's complaint, the plaintiff's claim for the fees had remained due and outstanding despite a consent judgment in respect of the dispute had already been entered three years prior to the 1st defendant's complaint to the Disciplinary Board.

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[11] The 1st defendant's questionable motive in the lodgment of complaint was evident in the 1st defendant's timely issuance of a letter to the plaintiff, made a day prior to the scheduled hearing of the complaint. The defendants' solicitor *vide* letter dated 7 July 2008 had proposed to withdraw the defendants' complaint to the Disciplinary Board against the plaintiff's firm and the plaintiff and settlement on the following terms:

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(a) The plaintiff's firm was to pay the defendants a sum of RM25,000 and withdraw Suit No. MT2-22-1285-2005 against 2nd defendant with no liberty to file afresh.

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(b) The plaintiff was further required to execute a letter of release confirming that plaintiff's firm had ceased from acting for the defendants in respect of a joint venture agreement where a consent judgment had been entered on 11 October 2004 with Syabas Pemaju (M) Sdn Bhd.

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[12] The defendants' proposal to settle was clearly, a feeble and frivolous conciliatory attempt and, the 1st defendant's lodgment of complaint was clearly made in the absence of any reasonable and probable cause necessitating such unwarranted complaint. That it was levelled against the very solicitor who had been engaged by the 2nd defendant to act and institute legal proceeding against a company, Syabas Pemaju (M) Sdn Bhd for trespassing the 2nd defendant's land and had settled 2nd defendant's claim against Syabas Pemaju *vide* a consent judgment between 2nd defendant and Syabas Pemaju. In an action for malicious prosecution as was held in the case of *Lim Chee Kuo v. The Pacific Bank Bhd* [1999] 1 CLJ 270 it was incumbent on the plaintiff to prove the following fundamental ingredients.

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- A (i) The prosecution by the defendants of a criminal charge against the plaintiff;
- (ii) That the proceedings were terminated in the plaintiff's favour;
- B (iii) That the defendants instituted the proceedings maliciously;
- (iv) That there was an absence of reasonable and probable cause for the proceeding;
- (v) That the plaintiff has suffered damage.
- C [13] In this regard, the court finds that the plaintiff have succeeded to prove all the ingredients of a malicious prosecution in the 1st defendant's lodgment of complaint against the plaintiff. The 1st defendant undisputedly had a right to initiate a complaint against his own solicitor, the plaintiff, based on the privilege of a client-solicitor relationship. The provisions of the law, namely
- D s. 94(3)(m) of the Legal Profession Act 1977 allows a complaint be made in respect of exorbitant bills issued by a solicitor to the client. The 2nd defendant had complied with the legal provisions in the lodgment of complaint pursuant to s. 99(1) of the Act.
- E [14] However, based on the circumstances preceding and surrounding the 2nd defendant's lodgment of complaint, it was clear that the complaint was not made in good faith nor premised on reasonable cause but, was clearly actuated and motivated by
- F the 1st defendant's clear intent of avoiding liability to pay the legal fees of the plaintiff which had remained outstanding and unsettled for the preceding three years since the plaintiff's demand for payment *vide* letter dated 28th October 2004. It was clear that as a result of the 1st defendant's frivolous and unreasonable
- G complaint, the plaintiff suffered consequent damage to his professional career and reputation which had been placed in jeopardy pending decision of the Disciplinary Board and, have adversely affected the plaintiff's reputation and integrity as a reputable practicing member of the bar and a senior partner of a
- H relatively large law firm.
- [15] Further it was clear that the 1st defendant's complaint against the plaintiff was duly and properly investigated and heard by the Disciplinary Committee and upon consideration of
- I Disciplinary Committee's recommendation was accordingly dismissed by the Disciplinary Board. The defendants failed to appeal against the Disciplinary Board's dismissal of the defendants' complaint on 21 August 2009.

[16] The defendants' lodgment of complaint against the plaintiff was made on 4 July 2007, two years after the plaintiff's filing and institution of civil action in the Shah Alam High Court for the recovery of the plaintiff's professional legal fees that was due and owing and had remained outstanding to the plaintiff. The defendants' lodgment of complaint to the Disciplinary Board of the Bar Council was made three years after both parties had recorded consent judgment on 11 October 2004 in respect of the civil suit at the Shah Alam High Court.

Conclusion

[17] Therefore based on the above grounds, on the consideration of the totality of the evidence adduced, the court finds that on a balance of probabilities the plaintiff have succeeded to prove the plaintiff's claim and accordingly, the plaintiff's claim is allowed with costs.

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